Supreme Court, U.S.
FILED

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OF THE UNITED STATES OF AMERICA
OCTOBER TERM, 2002

ALBERT MACKLIN,

Petitioner,

v.

THE CITY OF NEW ORLEANS, POLICE CHIEF, RICHARD PENNINGTON, MAYOR, MARC MORIAL, DEPUTY POLICE, CHIEF RONALD SERPAS AND NEW ORLEANS DISTRICT ATTORNEY HARRY CONNICK.

Respondents,

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX TO THE WRIT OF CERTIORARI

Kenneth M. Plaisance
Attorney for Petitioner
2067 North Miro Street
New Orleans, Louisiana 70119
Telephone: (504) 945-4176

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ISSUED ON : NOVEMBER 26, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT MACKLIN ,	CIVIL ACTION
vs.	00-1398
CITY OF NEW ORLEANS	SECTION F

JUDGMENT

For the written reasons of the Court on file herein, accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Harry Connick, Marc Morial, The City of New Orleans, Richard Pennington and Ronal Serpas and against plaintiff, Albert Macklin, dismissing plaintiff's suit.

New Orleans, Louisiana, this 26th day of November, 2001.

MARTIN FELDMANN

UNITED STATES DISTRICT JUDGE

APPENDIX B–ORDER AND REASON FROM DISTRICT COURT FOR THE EASTERN DISTRICT COURT OF LOUISIANA

ISSUED ON: November 20, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT MACKLIN ,	CIVIL ACTION
vs.	00-1398
CITY OF NEW ORLEANS	SECTION F

ORDER AND REASONS

Before the Court are cross-motions for summary judgment. For the reasons that follow, the defendants' motion is GRANTED and plaintiff's motion is DENIED.

I. Background

This civil rights lawsuit was filed by plaintiff, a former New Orleans Police Officer, against the City of New Orleans, and his fellow officers. The plaintiff, Albert Macklin, alleges that he was wrongfully arrested, unduly disciplined and discriminated by the defendants.

Macklin was first hired by the City of New Orleans on March 19, 1974, as a Correctional Officer. He held that position until February 18, 2000, when he was terminated for violating departmental rules and procedures. His termination was a result of an incident on July 25, 1998, when he was involved in a fight with Len Holmes. Macklin struck Holmes several times in the head with a police baton. Macklin did not seek medical treatment for Holmes and he allowed Holmes to leave the scene without notifying anyone. Macklin also failed to report the incident to his supervisor.

After an internal investigation was conducted by the

Public Integrity Division, it was determined that Macklin used unauthorized and excessive force against Holmes and that he neglected his duty in failing to notify a supervisor or complete an incident report. On May 9, and May 25, 2000, the Civil Service Commission held hearings and determined the Macklin's actions warranted termination from the police department.

II. Cross-Motions for Summary Judgement

This case is before the Court of cross-motions for summary judgment. The defendants move to dismiss Macklin's claims on summary judgment, while Macklin seeks summary judgment in his favor on his claims against the defendants.

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio, 477 U. S. 242, 248 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. See id. Therefore, "[i] f the evidence is merely colorable, or is not significantly probative," summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. See Celotex Corp. v. Catrett, 477 U. S. 317, 322-23 (1986). In this regard, the non-moving party msut do more than simply deny the allegations raised by the moving party. See Donaghey v. Ocean Drilling & Exploration Co., 974 F. 2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affividavits or depositions, to buttress his claims. Id. Hearsay evidence and unsworn documents do not qualify as competent opposing evidence. Martin v. John W.

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1. At time of the incident, Macklin was off duty and on suspension

Stone Oil Distrib., Inc., 819 F. 2d 547, 549 (5th Cir. 1997). Final, in evaluating the summary judgment motion, the court must read the facts in the light most favorable to the non-moving party. Anderson, 477 U. S. at 255.

a. Title VII Claims

The plaintiff first asserts claims of discriminatory administration of discipline and discriminatory failure to promote under Title VII of the Civil Rights Act of 1964. The Fifth Circuit has held that the filing of an administrative complaint is a jurisdictional prerequisite to a Title VII action. Dollis v. Rubin, 77 F. 3d 777, 781 (5th Cir. 1995). Prior to filing a judicial complaint, a plaintiff must exhaust his administrative remedies. Johnson v. Bergland, 614 F.2d 415, 417 (5th Cir. 1980); Barnes v. Levitt, 118 F. 3d 404 (5th Cir. 1997). A plaintiff must file an Equal Employment Opportunity Commission complaint and receive a "right to sue" letter. See Honea v. Sqs Control Services, Inc., 859 F. Supp 1025, 1029 (E. D. Tx. 1994). Macklin never filed a complaint with the EEOC or raised these claims in his Civil Service Commission hearing or in his appeal to the Louisiana Fourth Circuit Court of Appeal. Because the plaintiff failed to exhaust his administrative remedies with respect to these claims, the Court grants summary judgment.

b. Due Process Claims

The plaintiff also asserts that the defendants violated his due process rights by not providing adequate notice of thie allegations against him and for not informing him tha this conduct could result in disciplinary aciton, and therefore, plaintiff did not have an opportunity to respond. The Court also grants summary judgment on this claims.

Procedural due process entitles a public employee with a property right in his employment to notice of the charges against him, an explanation of the employer's evidence, and also an opportunity tho present his side of the story. Cleveland Bd. Of Education v. Loudermill, 470 U.S.

532, 546 105 S.Ct. 1487, 1495, 84 L. Ed 2d 494 (1985); Delahoussaye v. New Iberia, 937 F. 2d 144, 151 (5th Cir. 1991). To establish a denial of due process, a plaintiff must show that before termination he did not receive written notice of the reasons for termination and an effctive opportunity to rebut those reasons. See Thurston v. Dekle, 531 F.2d 1264 (1273) (5th Cir 1976) vacated on other grounds, 438 U. S. 901, 98 S. Ct. 3118, 57 L. Ed. 2d 114(1978). " Effective rebuttal must give the employee the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision." Id..

Although the state must accord a public employee "some kind of hearing" before termination, this may consist of no more than a meeting at which the employer states the grounds for dismissal and gives the employee an opportunity for rebuttal. See Cleveland Bd. Of Education v. Loudermill, 470 U. S. at 546, 105 S. Ct. at 1495.

The Court finds that Macklin was given adequate notice and an opportunity to address whether his conduct could have an adverse impact on his employment at the post-discipline hearing before a hearing examiner designated by the Civil Service Commission. Macklin was also afforded a subsequent appeal before the Civil Service Commission panel. In addition, the Court notes that Macklin was represented by counsel at both the hearing and the appeal. Because, the Court finds that these proceedings were sufficient under Cleveland Bd. Of Education v. Loudermill, the plaintiff's due process claim is also denied.

c. False Arrest Claims

Next, the plaintiff asserts that he was wrongfully arrested by the defendants after the incident with Holmes. The defendants respond that they are entitled to qualified immunity.

Qualified immunity shields government officials from civil damages if their conduct does not violate clearly

estiblished statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 547 U. S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). Oualified immunity is meant to give government officials a right now merely to avoid standing trial, but also to avoid such pretrial matters as discovery, because such inquiries can be peculiarly disruptive to effective government. Behrens v. Pelletier, 516 U. S. 299, 308, 116 S. Ct. 834, 839, 133 L. Ed 2d 733 (1996). That is, qualified immunity provides immunity from suit, not simply immunity form liability. Forster v. City of Lake Johnson, 47 F. 3d 1427, 1432 (5th Cir. 1995).

The qualified immunity analysis involves a two-step process. First, a court examines whether the plaintiff has alleged a violation of a clearly established constitutional right. Shipp v. McMahon, 234 F. 3d 907, 911 (5th Cir. 2000). If the plaintif has done so, the next step is to detemine whether the official's conduct was objectively reasonable at time of the incident. Id. At 912. Objective reasonableness is a matter of law for the courts to decide. Mangieri v. Clifton, 29 F.3d 1012, 1016, (5th Cir. 1994).

An individual has a federally protected right to be free from unlawful and detention resulting in a significan restraint of liberty and violation of this right can be grounds for a suit under Section 1983. See Dennis v. Warren, 779 F. 2d 245, 247. (5th Cir. 1985). Thus, the issue is whether the arresting officers acted reasonably under the circumstances. The Court finds that they did. The officers arrest Macklin after a charge by someone who had been injured by Macklin. Macklin didn't report the incident, but later admitted that an incident occurred. Under the circumstances and with the information that was provided to them, the arresting officers acted in an objectively reasonable manner when they determined that there was probable cause to arrest Macklin. See Thomas v. Kipperman, 846 F. 2d 1009, 1011 (5th Cir. 1988) (qualified immunity protects government officials from a charge of wrongful arrest where a reasonable official would believe probable cuase was present.)

d. Denial of Name-Clearing Hearing

Macklin also asserts that he was defamed by the defendants when they communicated the reason for his dismissal throughout the police department. He says he never had the opportunity to clear his name of the false charges.

Even absent a constitutionally protected property interst, a government employee may have a liberty interest in freedom from stigmatization. Well v. Doland, 711 F. 2d 670, (5th Cir. 1983. A discharge from public employment under circumstances that put the employee's reputation, honor, or integrity at stake gives rise to a liberty interest under the Fourteenth Amendment. Rosenstein v. City of Dallas, 876 F. 2d 392, 395 (5th Cir. 1989). Although for due process purposes, such an individual is not entitled to actual review of the decision to discharge him, the individual is entitled to a hearing providing a public forum or opportunity to clear his name. Id. Failure to give such a name clearing hearing can give rise to monetary damages for deprivation of a liberty interest. Id.

To succeed on a Section 1983 claim for denial of a name clearing hearing, the First Circuit requires the employee to prove: (1) that he was discharged; (2) that defamatory charges were made against him in connection to the discharge; (3) that the charges were false; (4) that no meaningful public hearing was conducted pre-discharge; (5) that the charges were made public; (6) that the employee requested a hearing to clear his name; and (7) that the request was denied. Rosenstein, 876 F. 2d at 395-96.

Public officials do not act improperly in publicly disclosing criminal charges against discharged employees, but they must thereafter afford procedural due process to the person charged. Rosenstein, 876 F. 2d at 395. That is, the defendants were not required to tender a name clearing hearing to the plaintiff prior to publicly disclosing the charges against him. See id. at 396, n 8. The defendants

deprived the plaintiff of a liberty interest only if they denied his request for a name clearing hearing. See id The record points to no evidence that suggests the plaintiff even requested a name clearing hearing, or that one was denied. Furthermore, the Court notes that a t both the post-disciplinary hearing and the appeal, Macklin never raised the this issue. Thus, plaintiff's defemation claims are also dismissed.

Accordingly,

IT IS ORDERED: that the defenddants' motion for summary judgment is GRANTED. Plaintiff's cross-motion for summary judgment is DENIED.

New Orleans, Louisiana November 19, 2001.

MARTIN L. C. FELDMAN
U. S. DISTRICT JUDGE

Respectfully submitted,

KENNETH M. PLAISANCE
ATTORNEY FOR PETITIONER
2067 NORTH MIRO ST.
NEW ORLEANS, LA 70119
504 945-4176
Louisiana Bar Number 19738

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5, I hereby certify that on this 9th day of November 2002, forty copies of the above and foregoing Supplement appendix were mailed to the Clerk of the Supreme Court of the United States of America, Washington D.C. I certify that two true and correct copies of the above and foregoing Petition for Writ of Certiorari were mailed to the person(s) identified below by depositing the same in the United States mail at New Orleans, Louisiana, first class, postage prepaid, and properly addressed to

Attorney for defendant/respondent
George Wallace,
New Orleans City Attorneys Office
1300 Perdido Street
Fifth Floor
New Orleans, Louisiana 70112

KENNETH M. PLAISANCE